



environmental defender's office

new south wales

Submission on the *Plantations and Reafforestation Amendment Bill 2009* and the *Plantations and Reafforestation (Code) Amendment Regulation 2009*.

12 February 2010

The EDO Mission Statement

To empower the community to protect the environment through law, recognising:

- ◆ *the importance of public participation in environmental decision making in achieving environmental protection*
- ◆ *the importance of fostering close links with the community*
- ◆ *the fundamental role of early engagement in achieving good environmental outcomes*
- ◆ *the importance of indigenous involvement in protection of the environment*
- ◆ *the importance of providing equitable access to EDO services around NSW*

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Executive Summary

The Environmental Defender's Office of NSW (EDO) welcomes the opportunity to provide comment on the *Plantations and Reafforestation Amendment Bill 2009* and the *Plantations and Reafforestation (Code) Amendment Regulation 2009*. The EDO is a community legal centre with over 20 years experience specialising in public interest environmental and planning law.

Plantation operations in NSW have the potential to cause serious environmental impacts from the establishment stage through to harvesting. Thus, the need for best practice environmental protection provisions in the *Plantations and Reafforestation Act 1999* ('the Act') and the *Plantations and Reafforestation (Code) Regulation 2001* ('the Code') is critical. The EDO, through its advice and casework, has been made aware of specific plantation operations that have led to soil erosion, water contamination, native vegetation removal and other deleterious impacts. We therefore largely welcome the proposed amendments as they attempt to prevent and reduce the potential environmental impacts of plantation activities through the use of robust standards. However, we have concerns with some of the recommendations which we will discuss in detail below.

We make the following key points and recommendations:

Plantations and Reafforestation Amendment Bill 2009

- The proposal to introduce the words 'best practice' before 'environmental standards' in the objects clause is strongly supported;
- The proposed amendment to section 14 that restricts the subject matter of public submissions to only "those aspects of the application that indicate non-compliance with the relevant complying development standards of the Code" is not supported;
- The requirement for a public register to be made available for inspection on the internet is supported;
- The proposed amendment allowing conditions to be placed on authorisations for non-complying plantations that relate to all aspects of the plantation, not just establishment operations, is supported;
- The proposed amendments to sections 58-60 that will allow the Minister to issue stop work orders and remedial notices to all plantations (not just those authorised under the Act) is supported;
- The extension of the powers of entry and inspection to land that an authorised officer suspects is required to be authorised as a plantation under the Act is strongly supported;

- The proposed amendment allowing authorised officers to enter land without giving reasonable notice if there is a risk of significant harm to the environment and the officer has attempted to contact the owner before entering the plantation or land is strongly supported;
- The proposed amendment which will allow officers to commence proceedings against operators who have allegedly breached the Act within two years of the date on which evidence of the alleged offence first came to the attention of an authorised operator is supported;
- In addition to increased enforcement and investigatory powers, the Government should introduce open standing provisions to allow any person to enforce a breach of the Act or Code or conditions of authorisations; and
- The proposed Part 5 of the Act that will require plantation operators that harvest more than 1000 tonnes of timber to lodge a security deposit in relation to plantation roads and to pay for any damage to roads used for plantation operations is supported.

Plantations and Reafforestation (Code) Amendment Regulation 2009

- The proposed amendment to the Code stipulating that establishment operations must not cause impeded or concentrated water flow that results in soil erosion within drainage depressions is supported;
- The proposed provisions in the Code requiring the removal of temporary crossings over drainage features to be done in a manner that prevents, as much as is reasonably practicable' disturbance to the beds and banks of the drainage feature is supported;
- The proposed requirement to reshape the bed and banks of the drainage feature if these become unstable during management operations in order to ensure unimpeded water flow is supported;
- The proposed provision allowing the use of slash crossings over drainage lines and depressions if there is no water flowing in the channel is not supported. Temporary crossings are only appropriate when drainage depressions are dry;
- The proposed provision in the Code prohibiting hauling on any natural surface road if there is runoff from the road surface is supported, as well as the requirement to repair roads with damaged drainage structures or blocked culverts as soon as practicable;
- The proposed amendments to Part 6 of the Code designed to ensure that harvesting operations have minimal impact on soils and watercourses are supported with some reservations;
- The proposed amendments to Clause 56 of the Code which relates to the protection of native vegetation in retained areas are strongly supported. However, given the importance of retaining habitat trees and native vegetation more generally, these protections should be elevated to the Act itself to give them more legislative weight;
- The proposed clause stipulating that private native forestry operations must not be carried out in retained areas is strongly supported;

- The requirement that any burning of plantation debris must not scorch retained habitat trees and native vegetation and that any herbicide spraying must not affect native vegetation is strongly supported; and
- Clauses 22 and 23 of the Code should be amended to remove the exceptions allowing clearing of retained high conservation value areas and habitat trees.

This submission makes comment on the following areas:

1. Plantations and Reafforestation Amendment Bill 2009

- Objects clause
- Authorisation of plantations
- Enforcement
- Plantation roads
- Existing plantations

2. Plantations and Reafforestation (Code) Amendment Regulation 2009

- Changes to environmental protection provisions – establishment operations (Part 4)
- Changes to environmental protection provisions – management operations (Part 5)
- Changes to environmental protection provisions – harvesting operations (Part 6)
- Retaining native vegetation

1. Plantations and Reafforestation Amendment Bill 2009

Objects clause

The EDO strongly supports the proposal to introduce the words ‘best practice’ before ‘environmental standards’ in the objects clause. This will strengthen the objects clause to ensure that the environmental standards in the Act are of the highest standard, which is consistent with the principles of ecologically sustainable development. However, the objects clause must be complemented and operationalised by substantive environmental protection provisions in the body of the Act. We discuss the proposed ‘best practice’ standards below.

Authorisation of plantations

Community consultation

The EDO does not support the proposed amendment to section 14 that restricts the subject matter of public submissions relating to non-complying plantations to only “those aspects of the application that indicate non-compliance with the relevant complying development standards of the Code”. This is unnecessarily restrictive. The Minister, in determining whether to grant approval to a non-complying plantation is legally required to consider the following factors:

- a) the provisions of the Code that apply to the plantation or proposed plantation,*
- (b) the likely impacts of the plantation operations concerned, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,*
- (c) in the case of a proposed plantation, the suitability of the site for the plantation,*
- (d) any submissions duly sought and made under this Act,*
- (e) the public interest*

The Minister's consideration therefore goes beyond merely considering the non-complying aspects of the proposal, to include environmental and social impacts, the suitability of the site, etc. The community should therefore be able to make submissions addressing these factors.

Public register

The EDO strongly supports the requirement for a public register to be made available for inspection on the internet. We note that the Department already does this, but this needs to be a legislated requirement.

Conditions of authorisation

The EDO supports the proposed amendment allowing conditions to be placed on authorisations for non-complying plantations that relate to all aspects of the plantation, not just establishment operations. It is important that there is an ability to place conditions that relate to the management and harvesting aspects of the operation and to impose site-specific restrictions.

Enforcement

The EDO strongly supports the increased enforcement and compliance powers proposed. In our experience, enforcement of the Act, particularly in relation to plantations operating without a lawful authorisation, is a key deficiency.

The success of the new 'best practice' environmental protections will be contingent on strong monitoring and enforcement action by the Government. The strengthened provisions are therefore a welcome step forward in addressing this deficiency.

Stop work orders and remedial notices

The EDO supports the proposed amendment to sections 58-60 that will allow the Minister to issue stop work orders and remedial notices to all plantations, not just those authorised under the Act. This allows the Minister to issue such orders to plantations operating without the requisite authorisation. Currently, the Minister is only able to issue such orders to plantations that have been lawfully authorised under the Act which severely limits the Minister's ability to restrain illegal or contravening operations.

Powers of entry and inspection

The EDO strongly supports the extension of the powers of entry and inspection in relation to land that an authorised officer suspects is required to be authorised as a plantation under the Act. Currently powers of entry and inspection only exist in relation to land containing plantations that have already been authorised under the Act.

Furthermore, we strongly support the amendment allowing officers to enter land without giving reasonable notice if there is a risk of significant harm to the environment and the officer has attempted to contact the owner before entering the plantation or land. This allows officers to prevent significant environmental consequences that may flow from a breach of the Act or Code. This proactive approach is consistent with ESD, particularly the precautionary principle.

These amendments will lead to greater compliance as operators will be aware that they are subject to greater oversight and will be less likely to contravene the Act as a result.

Proceedings for offences

The EDO supports the amendment of section 64 which will allow officers to commence proceedings against operators who have allegedly breached the Act within two years of the date on which evidence of the alleged offence first came to the attention of an authorized operator. The current provision only allows proceedings to be taken within two years of the alleged offence. As evidence often comes to light after a significant time has elapsed, it is important that officers are not thwarted by the unnecessary two year restriction.

Open Standing

The EDO submits that in addition to increased enforcement and investigatory powers, the Government should introduce open standing provisions to allow any person to enforce a breach of the Act or Code or conditions of authorisations. Currently only the Minister can initiate legal proceedings.

Open standing provisions are a key feature of NSW environmental legislation. They constitute strong accountability mechanisms that allow the community to ensure that the environmental standards and procedures of the Act are being met. The community can play an important role in overseeing the operation of plantations and enforcing conditions where the Department cannot. Indeed, given the difficulty of enforcing the Act by the Department due largely to resourcing constraints and often a lack of political will, introducing third party review rights would considerably strengthen compliance with the Act, and create a disincentive for non-compliance.

Allowing the community to challenge authorisations on the basis that the legislative process has not been followed is an important element of transparent and accountable governance.

Plantation roads

The EDO strongly supports the proposed Part 5 of the Act that will require plantation operators that harvest more than 1000 tonnes of timber to lodge a security deposit in relation to plantation roads and to pay for any damage to roads used for plantation operations. Currently, operators do not have to contribute to the management of these roads even when they have been degraded by plantation operations. This poses a safety threat to the community as well as potentially significant environmental consequences through runoff and soil erosion from degraded roads. It is therefore important that operators of plantations are responsible for the social and environmental externalities of their activities.

However, the EDO submits that consideration should be given to reducing the threshold to 500 tonnes of timber. In our estimation this is a more appropriate threshold given the significant number of truck movements required to haul such a tonnage.

Existing plantations

The EDO supports the proposed Part 3 of Schedule 3 of the bill which relates to existing plantations. We particularly welcome section 6(2)(b) which states that the exemption for existing plantations does not extend to a plantation that is replanted if the area that is replanted exceeds 30 hectares. This will ensure that 'new' operations are subject to environmental assessment and the provisions of the Code prior to approval.

2. Plantations and Reafforestation (Code) Amendment Regulation 2009

The EDO strongly supports the proposed amendments to the Code designed to improve the existing soil and water protection provisions. There is an urgent need to prevent and ameliorate the impacts that plantation operations are having on water courses and soil - especially the contribution to runoff, damage to water courses and soil erosion. We also support the further native vegetation protections that are proposed.

We agree with the Regulatory Impact Statement that these amendments have the potential to result in improved environmental outcomes in relation to soil erosion, water quality and biodiversity. However, this is subject to our comments and concerns below.

Changes to environmental protection provisions – establishment operations (Part 4)

The EDO welcomes the proposed amendment to the Code stipulating that establishment operations must not cause impeded or concentrated water flow that result in soil erosion within drainage depressions.¹

Changes to environmental protection provisions – management operations (Part 5)

Crossings

The EDO supports the proposed provisions in the Code requiring the removal of temporary crossings over drainage features to be done in a manner that prevents, as much as is reasonably practicable' disturbance to the beds and banks of the drainage feature. We also support the requirement to reshape the bed and banks of the drainage feature if these become unstable during management operations in order to ensure that water flow is not impeded.

However, we do not support the proposed provision allowing the use of slash crossings over drainage lines and depressions if there is no water flowing in the channel. This provision allows slash crossings to be used when there is water *present* in a drainage feature but where there is no water *flowing*. Given the potential impacts of slash crossings on water courses (such as polluting the waterway), this provision should be removed. Temporary crossings are only appropriate when drainage depressions are dry.

Blading off of roads

The EDO supports the proposed provisions in the Code placing environmental protection requirements in relation to blading-off of roads. In particular we support;

- The requirement that blading-off must only be carried out once per harvesting event;
- The requirement to stockpile bladed-off material in a recoverable position where it cannot wash into any river, drainage line or drainage depression and be re-spread as soon as possible;
- The requirement to drain and stabilize the bladed-off section of road; and

¹ Schedule 1 [7], Plantations and Reafforestation (Code) Amendment Regulation 2009

- The requirement for operators to notify the Director-General of blading-off within 2 days after it has occurred.

These provisions will assist in ensuring that blading-off of surfaces does not lead to runoff, water contamination or road instability.

Log haulage

The EDO supports the proposed provision in the Code prohibiting hauling on any natural surface road if there is runoff from the road surface. This will help prevent runoff from operations entering watercourses and impacting on soil integrity. We also support the requirement to repair roads with damaged drainage structures or blocked culverts as soon as practicable. However, there should be appropriate oversight from authorised officers to ensure that such repairs are in fact completed.

Changes to environmental protection provisions – harvesting operations (Part 6).

The EDO supports the following proposed provisions in the Code designed to ensure that harvesting operations have minimal impact on soils and watercourses;

- The requirement for any runoff from a log dump or landing to discharge onto a stable surface that is capable of filtering runoff water and trapping sediment;
- The requirement to locate log dumps outside a buffer distance from any drainage depression on soil classed R1, R2 or R3. However, the proposed 10 metres is insufficient as it does not ensure adequate protection. We also do not support allowing the temporary stockpiling of logs within a drainage depression as these can have significant impacts on the banks and the soils;²
- The requirement that directional felling be used to prevent the felling of trees into the defined channel of a wetland river or drainage line. However, we submit that the words ‘as much as practicable’ be removed to improve the strength of the provision.
- The requirement for any trees that are accidentally felled into a water channel to be removed unless the removal is likely to cause more than minimal disturbance to the beds and banks of the channel;
- The requirement to restore any disturbed area to 70% groundcover within 7 days of the removal of any logs and the filling of any furrows;
- The requirement for harvesting operations to minimise water runoff from the harvest area as far as practicable; and
- The prohibition on operating harvesting machinery on natural surfaces if runoff is occurring except in limited circumstances.

² Schedule 1 [47] Plantations and Reafforestation (Code) Amendment Regulation 2009

Retaining native vegetation

The EDO strongly supports the proposed amendment to Clause 56 of the Code which relates to the protection of native vegetation in retained areas. However, given the importance of retaining habitat trees and native vegetation more generally, we submit that these protections should be elevated to the Act itself to give them more legislative weight.

We support the proposed clause that stipulates that private native forestry operations (within the meaning of the *Native Vegetation Regulation 2005*) must not be carried out in retained areas. We also support the requirement that any burning of plantation debris must not scorch retained habitat trees and native vegetation. Moreover, we strongly support the requirement that any herbicide spraying must not affect native vegetation. However, consideration should be given to extending this to include fungicides and insecticides.

Further amendments needed

The EDO also proposes further amendments to the native vegetation protection provisions in the Codes. Clause 22 sets out that retained areas of native vegetation include rainforests, wetlands and high conservation value grasslands. However, Clause 22(b) allows the Director-General to authorise the clearing of ‘irregular projections’ in certain circumstances. This is a highly subjective provision that is open to abuse. We submit that this provision should be removed to ensure that high conservation areas are in fact retained. This is consistent with the conservation of biodiversity principle of ecologically sustainable development (ESD). The objects of the Act must all be exercised consistently with ESD.³

There is a similar issue with Clause 23 which relates to the retention of up to 30 habitat trees per 30 hectares. Despite the retention requirement, operators can clear these retained trees in certain circumstances as long as they are ‘replaced’ by either 10 or 20 new native trees (depending on diameter). If the tree seedlings have not naturally regenerated in the designated area within 18 months then they must be replanted. The EDO has significant concerns with this exception. Seedlings do not provide suitable habitat (such as hollows) for many years and do not compensate for the interim loss of biodiversity. Moreover, there is no guarantee that the seedlings that are replanted or that naturally re-generate will grow to maturity. Given these concerns, the EDO submits that the exception allowing clearing of retained habitat trees in Clause 23 should be removed.

***For more information in relation to this submission please contact Rachel Walmsley
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³ Section 3, *Plantations and Reafforestation Act 1999*.